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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted]169

ROBERT BOLIVAR DePUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Robert Bolivar DePugh, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered April 15, 1968, affirming his conviction under 15 U. S. C., Sec. 902 (e), and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. 1) is not yet reported.

An opinion of the District Court overruling the defendant's Motion to Dismiss Indictment is reported, 266 F. Supp. 453 (App. 3).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 15, 1968. Timely Motion for Rehearing was filed, and was denied on May 9, 1968. This Court has jurisdiction under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether 15 U. S. C., Sec. 902 (e), in forbidding the transportation across state lines of firearms by persons under indictment, constitutes an infringement of the right to keep and bear arms in violation of the Second Amendment.

2. Whether 15 U. S. C., Sec. 902 (e) constitutes a discrimination against persons under indictment, and a prejudgment of guilt, all in violation of the Fifth and Sixth Amendments.

3. Whether 15 U. S. C., Sec. 902 (e) is properly construed as applying to a state indictment which is "fatally defective" and "not susceptible of amendment" under state law, and which is probably not in compliance with minimum due process standards.

4. If the answer to Question 3 is "yes," whether 15 U. S. C., Sec. 902 (e) is arbitrary and unreasonable and therefore presents a deprivation of property without due process of law, in imposing discriminatory sanctions against a person held to answer a void indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Second Amendment.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 564.580, Missouri Revised Statutes:

"564.580. Possession or control of bomb prohibited—penalty. Every person who has in his possession or under his control a bomb or bombshell, or who carries or possesses any explosive substance with the intent to use the same unlawfully against the person or property of another, is guilty of a felony, and upon conviction therefor, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than ten years. The terms 'bomb' and 'bombshell' as used in this section shall be held to

mean any device or object containing dynamite or any other explosive or highly combustible substance or chemical connected with a fuse, dynamite cap or other device or substance whereby such explosive or highly combustible substance or chemical may be ignited or exploded, and capable of causing bodily injury or death to persons, or damage or destruction to property; provided, that this section shall not apply to the lawful possession of bombs or bombshells by peace officers or by members of military forces in the regular discharge of their duties as such (R. S. 1939, No. 4818)".

Title 15 U. S. C., Section 902 (e) (52 Stat. 1250 (1938), Ann. 75 Stat. 757 (1961)):

"It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

STATEMENT OF THE CASE.

The indictment, handed down August 20, 1966, charged the petitioner with transportation of a firearm in interstate commerce while under indictment in the State of Missouri on charges punishable by imprisonment for a term in excess of one year.

The state indictment attempted to charge violation of Mo. R. S., Sec. 564.580 and, omitting captions and signatures, reads as follows:

The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson,

being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on or about the 9th day of July, 1965, one Robert B. DePugh, whose more true and full name is unknown to the members of the Grand Jury, did then and there unlawfully, wilfully and feloniously have in his possession and under his control various bombs and bomb shells; against the peace and dignity of the State.

Petitioner moved to dismiss the federal indictment on assigned grounds as follows: (a) failure to state an offense; (b) unlawful discrimination against persons who have been indicted but have not been convicted; and (c) invalidity of the state indictment. The District Court overruled these motions in an opinion dated January 27, 1967. (App. C, below.)

The case was called for trial on January 31, 1967. The Defendant entered a plea of *nolo contendere.* The District Attorney in his following statement to the court indicated that he had intended to establish his case by showing (i) the purchase by the defendant of a number of pistols in Iowa and (ii) subsequent possession by the defendant of one of these pistols in Missouri. The court sentenced the defendant to one year in jail, the sentence to run concurrently with the sentence on another charge. (The case in which the other sentence was imposed is pending and undisposed in the United States Court of Appeals for the Eighth Circuit.) At the time of sentencing a Motion to Dismiss the state indictment was pending and undisposed.

Following the filing of notice of appeal in this case the Circuit Court of Jackson County sustained a motion to dismiss the state indictment and quashed the proceedings. The opinion and order of this court is set out in Appen-

dix D. The court held as follows: "The indictment is fatally defective. . . ." It also held: ". . . Nor do we believe, that the indictment is susceptible of amendment by information in lieu thereof. . . ." The state proceedings were brought to the attention of the court below by a stipulation entered into by both parties.

We seek review of the affirmance of the conviction and sentence, and outright reversal of the conviction.

REASONS FOR GRANTING THE WRIT.

1. 15 U. S. C., Sec. 902 (e), presents a patent violation of the Second Amendment, as to a person who is under indictment but unconvicted. He is denied the constitutional right to keep and bear arms, in a very substantial degree. The case is wholly unlike **United States v. Miller,** 307 U. S. 174 (1939), in which the weapon involved, a sawed-off shotgun, was found by the Court to have no use in the activities of the militia. Sec. 902 (e) applies to any weapon operated on the principle of explosive propulsion. **United States v. Tot** (D. C. N. J., 1941), 42 F. Supp. 252, reversed on other grounds, 319 U. S. 463 (1943).

The present statutory provision is not even limited to the person who crosses a state line with gun in hand. As the present proceedings show, it applies to any indicted person who causes the transportation by any means. Nor can the statute be justified as applying to persons who might be disposed to violent tendencies. It applies to any indictment, at least if the offense is punishable by sentence in excess of one year, and without regard to the violent or non-violent nature of the offense charged.

Where the restriction of a constitutional right is apparent this court has been disposed to grant review and to place a strict burden on those seeking to justify the con-

stitutional restriction. See **United States v. Lovett,** 328 U. S. 303 (1946), involving Bill of Attainder.

2. There is no justification for discrimination against persons under indictment, so as to sanction the curtailment of their constitutional rights. The effect of a statute such as this one is to prejudge the guilt of the defendant and impose an additional burden on him for doing something which has express constitutional sanction. It is a form of double jeopardy. Nor is it necessary. Restrictions on a person under indictment are normally matters to settle between him and the sovereignty returning the indictment. These may include release on bail and, no doubt, restrictions on the carrying or transportation of weapons imposed by the court approving bond. There is no warrant, however, for imposing additional federal sanctions against one who stands unconvicted.

What was said in **Lanzetta v. New Jersey,** 306 U. S. 451 (1939), as to additional burdens on an ex-convict would apply, *a fortiori,* to burdens on a person who has not even been convicted.

3. A criminal statute will be construed in a reasonable manner. **Haynes v. United States,** 390 U. S. 85 (1968). It is not reasonable to assume that Congress, in specifying "indictment", would have had in mind an indictment which is fatally defective under state law, to such an extent that it could not even be corrected by amendment. The court below is wholly in error in its assumption that the defects in the state indictment were merely formal matters which could be cured by amendment. The Missouri Circuit Court held just the contrary, and the correctness of its views under state law is shown in the careful opinion accompanying the order of dismissal. The state did not appeal, no doubt because it was evident that the ruling was correct. The state indictment, moreover,

probably does not comply with elementary standards of due process of law as illustrated by cases such as **Russell v. United States**, 369 U. S. 749 (1962).

Two courts of appeals have indicated that Sec. 902 (e) was intended to apply only to persons who "had legally been charged." See **Quinones v. United States**, 161 F. 2d 79, 81 (1 Cir. 1947); **Schook v. United States**, 337 F. 2d 563, 567 (8 Cir. 1964). To restrict the constitutional rights of a person held on an indictment which is wholly void would be very strange. Such an intention on the part of Congress should not be presumed.

4. If Section 902 (e) is construed so as to apply to an indictment which is wholly insufficient and void, this would constitute an invidious and arbitrary discrimination against unconvicted persons, in violation of the Fifth and Sixth Amendments. There is the opportunity for serious oppression if one's constitutional rights are restricted simply because a state prosecutor has been able to procure a document bearing the name of indictment, but which does not even charge an offense. Second Amendment rights should not be infringed on such flimsy grounds.

It is no answer to say that a person under indictment could procure such weapons as he might need for his own protection in his home state. Courts have taken judicial notice of the fact that weapons are not available in all jurisdictions. **Cases v. United States** (1 Cir. 1942), 131 F. 2d 916. There must be substantial justification for any restriction or dilution of constitutional rights.

5. The questions in this case are important questions of federal law which have not been, and should be, determined by this court. There is much discussion of problems relating to firearms (as is shown by the widely-reported trial and conviction of H. Rap Brown, apparently under the

same section of the statute as is involved here.) It is important both to the government and to the public that the scope and limits of statutes such as these be known. The Second Amendment has importance, as do all parts of the Bill of Rights. The case is appropriate for review.

Respectfully submitted,

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